

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

COSME IBARRA-ROSAS,
Defendant.

No. CR-98-2135-FVS

ORDER DENYING MOTION TO
VACATE

THIS MATTER comes before the Court pursuant to 28 U.S.C. § 2255. The defendant is representing himself. The government is represented by Assistant United States Attorney Gregory M. Shogren.

BACKGROUND

The defendant was charged with conspiring to export cocaine to Canada. 21 U.S.C. § 953. He unsuccessfully moved to dismiss the Indictment on grounds of double jeopardy, pre-indictment delay, and pre-trial delay. A jury found him guilty. The Court made four significant factual determinations at sentencing: (1) the defendant is accountable for 32 kilograms of cocaine; he possessed a firearm within the meaning of the Sentencing Guidelines; he was an organizer or leader; and he physically restrained and assaulted a fellow conspirator in order to facilitate the commission of the crime. Based upon these determinations, the Court ordered him to serve a term of 360 months imprisonment. The Ninth Circuit upheld his conviction, but reversed the sentence pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The

1 Court ordered him to serve a term of 240 months imprisonment. The
2 Ninth Circuit upheld the finding that he is accountable for 32
3 kilograms of cocaine and the finding that he possessed a firearm.
4 Since these findings are sufficient to justify the sentence, the
5 Ninth Circuit declined to review the remaining findings; choosing,
6 instead, to affirm. The defendant moves to vacate the judgment and
sentence under 28 U.S.C. § 2255.

7 **EFFECTIVE ASSISTANCE**

8 The defendant alleges his attorneys failed to provide
9 constitutionally effective assistance as guaranteed by the Sixth
10 Amendment to the Constitution. In order to obtain relief, he must
11 satisfy a two-part test. First, he must demonstrate that the
12 performance of one of his former attorneys was deficient. Second, he
13 must demonstrate that the attorney's deficient performance prejudiced
14 his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104
S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

15 *A. Disclosure of Indictment*

16 The defendant was in federal custody facing separate charges at
17 the time law enforcement officers were investigating the events that
18 led to the conviction at issue here. The defendant says the
19 government did not disclose, prior to his guilty plea in the other
20 case, that it was on the verge of charging him with a new offense.
21 He says his attorney should have challenged the validity of the
22 Indictment based upon the government's failure to do so. The Court
23 disagrees. The defendant's attorney would have accomplished nothing
24 by seeking dismissal based upon the government's failure to disclose
25 the new charge prior to his plea of guilty in the other case. In
26 fact, the most promising grounds were those actually raised by his
attorney: double jeopardy, pre-indictment delay, and pre-trial

1 delay. The attorney's decision to litigate these issues, rather than
2 the one cited by the defendant, was a reasonable response to the new
3 Indictment.

4 *B. Discussions Between Attorney and Client*

5 The defendant alleges that his attorney met with him only twice
6 before trial and that he did not bring an interpreter with him on
7 either occasion. Consequently, says the defendant, his attorney did
8 not obtain enough information from him in order to prepare an
9 adequate defense. However, the defendant does not identify any
10 information he could have provided to his attorney prior to trial
that would have bolstered his defense.

11 *C. Plea Offer*

12 The defendant alleges the government offered to recommend a ten-
13 year term of imprisonment if he pleaded guilty. The defendant
14 insists he would have accepted the offer had his attorney
15 communicated it to him. The Assistant United States Attorney
16 ("AUSA") who represents the government in this action has submitted a
17 declaration concerning this allegation. He says settlement offers
18 are made in writing; there is nothing in his file indicating he made
19 an offer; and he does not recall making one. The defendant has made
no effort to rebut the AUSA's declaration.

20 *D. Jury Instructions*

21 The defendant submits his attorney should have challenged the
22 jury instructions on the ground they relieved the government of
23 proving he knew his actions were unlawful. However, the defendant
24 has not cited any specific instruction he thinks was improper and the
Court declines to guess which one he is referring to.

25 *E. Factual Determinations During the Sentencing Phase*

26 The Court made a number of findings that affected the length of

1 the defendant's sentence. These concerned the quantity of cocaine
2 for which he is accountable, his possession of a firearm, his role as
3 an organizer or leader, and the fact he restrained and assaulted a
4 fellow conspirator. The Court's findings were reviewed by the Ninth
5 Circuit after *Apprendi* but before *Blakely v. Washington*, 542 U.S.
6 296, ---, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004). The
7 defendant claims his trial and appellate attorneys' performance was
8 deficient because they failed to anticipate the Supreme Court's
9 holdings in *Blakely* and *United States v. Booker*, 543 U.S. ----, 125
10 S.Ct. 738, 160 L.Ed.2d 621 (2005). The Court disagrees. "A fair
11 assessment of attorney performance requires that every effort be made
12 to eliminate the distorting effects of hindsight, to reconstruct the
13 circumstances of counsel's challenged conduct, and to evaluate the
14 conduct from counsel's perspective at the time." *Strickland*, 466
15 U.S. at 689, 104 S.Ct. at 2065. The defendant's attorneys argued the
16 law as it existed prior to *Blakely*. They cannot be faulted for
17 relying upon what was, at the time, the binding interpretation of
18 *Apprendi*.

19 *F. Weight*

20 The Court found the defendant was legally accountable for 32
21 kilograms of a mixture or substance containing cocaine. The
22 defendant says his attorneys should have asked the Court to subtract
23 the weight of packaging materials and "cutting" agents. He is
24 incorrect. To begin with, he has cited no authority for the
25 proposition that, in the case of powdered cocaine, a sentencing court
26 must exclude cutting agents when determining the quantity of cocaine
for which a person is legally accountable. Furthermore, excluding
the weight of packaging materials would not have made a difference.
Under the Drug Quantity Table, anyone who possesses at least 15, but

1 less than 50, kilograms of a mixture or substance containing cocaine
2 receives a base offense level of 34. There is no reason to think the
3 packaging materials weighed over 17 kilograms.

4 *G. Court's Calculation of Adjusted Offense Level*

5 The defendant says his attorneys did not contest the Court's
6 calculation of the adjusted offense level. He is mistaken. As the
7 government points out, it is clear from both the brief submitted on
8 the defendant's behalf and the Ninth Circuit's second opinion, that
9 his appellate attorney challenged the Court's findings with respect
10 to drug quantity, possession of a firearm, role in the offense, and
the assault of a co-conspirator.

11 *H. Criminal History*

12 The defendant says his attorneys did not challenge the Court's
13 calculation of his Criminal History Category. While this may be
14 true, the defendant has provided no reason for thinking that the
15 Court's calculation was erroneous and that his attorneys should have
been aware of the error.

16 *I. Departure Based Upon Sentence Factor Manipulation*

17 The defendant says his trial attorney should have sought
18 downward departure based upon sentence factor manipulation. See
19 *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir.1999) (per curiam)
20 ("Sentencing entrapment or sentence factor manipulation occurs when
21 a defendant, although predisposed to commit a minor or lesser
22 offense, is entrapped in committing a greater offense subject to
23 greater punishment.'" (quoting *United States v. Staufer*, 38 F.3d
24 1103, 1106 (9th Cir.1994))). However, other than making an
25 unsubstantiated assertion that the AUSA "coached" the government's
26 witnesses, the defendant has identified no evidence his attorney
could have offered in support of such a request.

1 *J. Adequacy of Court's Findings*

2 The defendant says his attorneys should have argued that the
3 Court's written findings failed to comply with the Federal Rules of
4 Criminal Procedure. However, the record reflects that the Court
5 entered detailed findings. These were reviewed by the Ninth Circuit.
6 This satisfied the requirements of the Federal Rules of Criminal
7 Procedure.

8 **BOOKER**

9 The defendant's conviction became final before the Supreme Court
10 decided *Blakely* and *Booker*. The Ninth Circuit has held that *Blakely*
11 does not apply retroactively to convictions which became final before
12 it was decided. *Schardt v. Payne*, 414 F.3d 1025, 1036, 1038 (9th
13 Cir.2005). Other circuit courts of appeal have held that *Booker* does
14 not apply retroactively to convictions which became final before it
15 was decided. See, e.g., *Guzman v. United States*, 404 F.3d 139, 144
16 (2d Cir.2005). In view of *Schardt*, there is every reason to think
17 the Ninth Circuit will follow its sister circuits' lead and hold that
18 *Booker* does not apply retroactively. Thus, the defendant may not
19 challenge his sentence based upon *Booker*.

20 **NON-CONSTITUTIONAL SENTENCING ISSUES**

21 The defendant argues the Court erred by failing to make an
22 individualized determination concerning the quantity of cocaine for
23 which he is accountable. Accordingly to the defendant, the Court
24 improperly attributed to him all of the cocaine that the conspirators
25 exported to Canada. In addition, the defendant argues the Court
26 erred by finding that he possessed a firearm, that he was an
 organizer, and that he restrained a woman who was working under his
 direction in the conspiracy. Were this case governed by the
 Blakely/Booker rule, these determinations arguably would implicate

1 the Sixth Amendment; but, as explained above, this case is not
2 governed by the *Blakely/Booker* rule. As a result, the errors
3 allegedly made by the Court at sentencing are non-constitutional
4 sentencing errors. Since these errors either were or could have been
5 raised by the defendant in his direct appeal, he may not challenge
6 them under 28 U.S.C. § 2255. See *United States v. Hayes*, 231 F.3d
7 1132, 1139 (9th Cir.2000); *United States v. Schlesinger*, 49 F.3d 483,
485 (9th Cir.1995).

8 **EX POST FACTO VIOLATION**

9 The defendant implies that the version of the Guidelines under
10 which he was re-sentenced resulted in a harsher sentence than the
11 version of the Guidelines under which he originally was sentenced.
12 See *Hamilton v. United States*, 67 F.3d 761, 764-65 (9th Cir.1995)
13 (whenever the use of an amended version of a Sentencing Guideline
14 would result in a harsher sentence than the earlier version, the use
15 of the new version violates the Ex Post Facto Clause). However, he
16 has not attempted to demonstrate that the newer version actually
17 resulted in a harsher sentence, and, as the government argues, there
is no reason to think that this is so.

18 **IT IS HEREBY ORDERED:**

19 1. The defendant's motion for appointment of counsel (**Ct. Rec.**
20 **151**) is denied.

21 2. The defendant's motion for an evidentiary hearing (**Ct. Rec.**
22 **151**) is denied.

23 3. The defendant's motion for an order requiring the government
24 to respond to his Second Supplemental Memorandum (**Ct. Rec. 165**) is
denied.

25 4. The defendant's motion for an order requiring the government
26 to respond to his Second Supplemental Memorandum (**Ct. Rec. 165**) is

1 denied.

2 5. The defendant's motion to vacate (**Ct. Rec. 148**) is denied.

3 6. The defendant's motion to vacate (**Ct. Rec. 149**) is denied.

4 7. Any other pending motions are denied as moot.

5 **IT IS SO ORDERED.** The District Court Executive is hereby
6 directed to enter this order, furnish copies to the defendant and
7 counsel for the government, and close the parallel civil action.

8 **DATED** this 25th day of August, 2005.

9 s/ Fred Van Sickle
10 Fred Van Sickle
United States District Judge